

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

BARRY E. THOMAS,

Petitioner-Appellant.

v.

No. 99-7501

RONALD J. ANGELONE, Director of

the Virginia Department of

Corrections,

Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of Virginia, at Norfolk.

Rebecca B. Smith, District Judge.

(CA-98-1199-2)

Submitted: April 20, 2000

Decided: May 16, 2000

Before WILLIAMS, MICHAEL, and TRAXLER, Circuit Judges.

Dismissed by unpublished per curiam opinion.

COUNSEL

Barry E. Thomas, Appellant Pro Se. Linwood Theodore Wells, Jr.,

Assistant Attorney General, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Barry Thomas appeals from the district court's order adopting the report and recommendation of the magistrate judge and denying relief on Thomas's 28 U.S.C.A. § 2254 (West 1994 & Supp. 1999) petition. The court determined that, with the exception of his claim of actual innocence, Thomas's claims were procedurally defaulted. The court construed the claim of actual innocence as an insufficiency of the evidence claim and reviewed it under *Jackson v. Virginia*, 443 U.S. 307, 324 (1979), before determining that there was sufficient evidence to support Thomas's conviction.

In his objections to the magistrate judge's report and recommendation and on appeal, Thomas has argued that the court misconstrued his petition. He contends his claim of actual innocence was improperly construed as a claim of insufficient evidence and should have been considered in relation to his procedurally defaulted claims so he could gain review of those claims.

Thomas may overcome his procedural default by showing either cause and prejudice or actual innocence. See *United States v. Mikalajunas*, 186 F.3d 490, 493-94 (4th Cir. 1999), *cert. denied*, ___ U.S. ___, 2000 WL 157197 (U.S. Mar. 6, 2000) (No. 99-8074). We have reviewed the record and find Thomas has not established cause and prejudice or actual innocence. Therefore, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED